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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 156

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, PETITIONER

v.

YEE CHIEN WOO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent takes issue with our conclusion, rested on careful examination of the legislative history, that Congress intended the absence of "firm resettlement" in another country to be an essential prerequisite to the invocation of the refugee benefits of Section 203 (a)(7) of the Immigration and Nationality Act; he also appears to raise a new issue—not dealt with in our opening brief because not reached by the court below—as to whether he had, in fact, been firmly settled in Hong Kong before coming to this country. These contentions warrant brief response.

414-314—71

I

Much of petitioner's argument rests upon an erroneous reading of legislative language. Contrary to his assertion (Resp. Br. 6, 11, 12),[1] the "not a national" phrase did *not* appear in the Refugee Act of 1957 (71 Stat. 639). It first appeared in the "Fair Share" Act of 1960.[2]

The fact that no mention of "firm resettlement" appeared in the 1957 Act is wholly understandable since it would have been entirely superfluous there, given the special purpose of that enactment. As the Second Circuit pointed out in *Shen* v. *Esperdy*, 428 F. 2d 293, 299, the 1957 Act was a temporary statute, primarily enacted for the limited purpose of liquidating the "pipeline" cases remaining at the expiration of the Refugee Relief Act of 1953. That the 1957 Act

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[1] The court below similarly misread statutory language. See 419 F. 2d at 254.

[2] Respondent is also in error in contending that the "not a national" language appeared in the Migration and Refugee Assistance Act of 1962 (76 Stat. 121) which, in any event, has no bearing on this case. The major purpose of this legislation was to provide asistance and appropriate funds for and on behalf of refugees. Apart from extending the Fair Share Act, the only possible relevance of that statute was its provision for assistance and funds for refugees fleeing persecution in the Western Hemisphere—mainly those escaping from Cuba (see H. Rep. 1066, 87th Cong., 1st Sess. p. 16; S. Rep. 989, 87th Cong., 1st Sess. p. 1). This statute had nothing to do with immigration eligibility or status; and in these circumstances, it would have been pointless for that Act to have prescribed "firm resettlement."

In order to eliminate any misunderstanding, we have set forth the relevant language of the various statutes having any conceivable bearing on the case in the Appendix, *infra* pp. 11–14, except for the 1965 Act which we have set forth in our opening brief pp. 2–3.

was not intended to alter previous criteria regarding "firm resettlement" is shown by the House Committee Report (H. Rep. 1199, 85th Cong., 1st Sess., pp. 2, 3, 13)[3] which stated that the 18,656 visas remaining under the Refugee Relief Act were being made available for "the category of immigrants for whom they were originally intended." As our opening brief points out (Pet. Br. p. 14 n. 14), the State Department, in a contemporaneous interpretation of this statutory purpose, immediately adopted regulations setting forth the "firmly resettled" criterion in implementing the 1957 Act.

As for the "Fair Share" Act of 1960, we have fully canvassed in our opening brief its special history, reflecting this country's participation in the effort of the United Nations to close remaining displaced persons camps in Europe (Pet. Br. 14–19). In essence, the United States under this statute undertook to accept for resettlement in this country its fair share of refugees under the mandate of the United Nations High Commissioner for Refugees (hereafter UNHCR). It is enough to note here that in this setting it seems likely that the statute's provision that an applicant seeking its benefits could not be a national of the country in which he applied was simply patterned after the mandate of UNHCR from which

[3] It is also possible that the absence of any reference to "firm resettlement" in the 1957 Act was simply a matter of verbal considerations. The 1957 Act combined "refugee" and "escapee" concepts in a single subsection, while the "firmly resettled" condition had appeared in the Refugee Relief Act of 1953 only in relation to the refugee aspect. See Appendix A, *infra* pp. 12, 13.

the legislation stemmed (see S. Rep. 1651, 86th Cong., 2d Sess., p. 23). Section 6 of the UNHCR statute specified that the mandate would apply only to one who "is outside the country of his nationality." [4] It may also be significant that Section 7(b) of the UNHCR statute specified that the High Commissioner's mandate did not extend to a person

> Who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

This latter provision could be regarded as a substantial adoption of the firm resettlement concept. The underlying premise of the "Fair Share" Act, that each nation should be responsible for the care of its own refugees even if they had originally come as refugees from other areas. Viewed in the total context, this premise did not necessarily exclude the firm resettlement concept.

II

The respondent seeks to find support for his construction of Section 203(a)(7) of the 1965 Act itself—the precise legislative provision involved in the present suit—in a statement made during Senate debate and in a 1968 United Nations Convention relating to refugees. Analysis shows that neither supports his case.

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[4] Annex to United Nations General Assembly Resolution 428 (V), December 14, 1950. The official text of the UNHCR statute is set forth in United Nations Resolutions Relating to the Office of the United Nations High Commissioner for Refugees (2d ed.) HCR/INF/48/Rev. 1. A portion of its text is set forth in S. Rep. 1651, 86th Cong., 2d Sess., p. 23.

1. As we have detailed in our opening brief (Pet. Br. 19–26), the legislative history of Section 203(a)(7) contains many statements that its aim was to give the Executive flexible means to aid "the homeless and oppressed."[8] The only support respondent has mustered for the proposition that Congress nevertheless meant to open its benefits to aliens firmly settled elsewhere is a statement made by Senator Edward M. Kennedy, the Committee spokesman, in the floor debate on the 1965 Act, that the refugees benefited by the bill "must be currently settled in countries other than their homelands." 111 Cong. Rec. 24227. It is our submission that to read this observation as rejecting the firmly resettled concept, is not only to reject all other indicia of congressional intent but also to take the comment out of its immediate context. The remarks referred to were part of a long exposition on the Senate floor of many provisions of the bill, of which Section 203(a)(7) was only a small part. Senator Kennedy's use of the word "settled"—which does not appear in the statute or the Committee Reports—appears to have been simply a paraphrase of the statutory directive ultimately adopted, excluding nationals of the country or area in which the application was made. Examination of his statement in its entirety reveals that the Senator was urging the need to provide sanctuary for homeless persons. Indeed, shortly after uttering this sentence, Senator Kennedy spoke

[8] This comment was made by Senator Hart, the principal author of the 1963 and 1965 Senate versions of the Administration Bill. See S. 1932, 88th Cong., 1st Sess.; S. 500, 89th Cong., 1st Sess.; 111 Cong. Rec. 24239.

(in relation to the natural calamity provision) of assuring "that we will remain a haven for the displaced," and that "the cases of the greatest need can be processed at once." Moreover, in the course of a subsequent colloquy with Senator Kuchel, during the floor debate, Senator Kennedy commented that the bill "establishes quite clearly what we mean by refugees—*those fleeing* from Communist domination, from the effects of natural calamity, or from the defined areas in the Middle East." 111 Cong. Rec. 24230 (emphasis added). These observations hardly are consistent with respondent's interpretation; on the contrary, Senator Kennedy's reference to "those fleeing" is consistent with the statutory protection of those who "have fled" persecution.

2. On July 28, 1951, a Convention Relating to the Status of Refugees was adopted by the United Nations.[6] The Convention was not, however, intended to deal with immigration, or to bind any signatory to receive refugees. It related only to the status of refugees outside the country of their nationality after they had been received in another country, and sought to assure them various political, economic and civil rights there. The United States never became a signatory, apparently because it deemed the status of refugees abundantly protected in this country.

Since the Convention related only to those who had refugee status before 1951, it had only limited utility.

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[6] The full text of the Convention is set forth as an Annex to TIAS 6577, 19 U.S. Treaties 6259. It will be noted that the terminology and definitions of the Convention closely resemble those in the contemporaneous UNHCR statute (see note 4 *supra*, and relating text).

In 1967 the United Nations decided to give the Convention current vitality; accordingly, on January 31, 1967, it adopted a Protocol Relating to the Status of Refugees. The Protocol merely noted that new refugee situations had developed since the adoption of the Convention and undertook to apply the Convention to all refugees. This Protocol was presented to the United States Senate and was quickly ratified, becoming effective as to the United States November 1, 1968, upon proclamation of the President. TIAS 6577, 19 U.S. Treaties 6259. Although the 1951 Convention was thus adopted by the Protocol, it continued to be concerned not with the acceptance of refugees but with their political, economic and civil rights once asylum has been given. In short, the Protocol in no way relates to the rights of aliens temporarily in this country who might seek to obtain adjustment of status; nor is there any reason submitted why it aids respondent's interpretation of Section 203(a)(7).[7]

3. Respondent also seeks to distinguish the recent Second Circuit decision in *Shen* v. *Esperdy*, 428 F. 2d

[7] In transmitting the Protocol to the Senate, and urging its ratification, President Johnson stated that: "Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States." Executive K, 90th Cong., 2d Sess. A similar comment was made in the favorable report of the Senate Foreign Relations Committee. S. Exec. Rep. 14, 90th Cong., 2d Sess., p. 2. The Senate Committee Report also incorporated the testimony of Laurence Dawson, a State Department official. Mr. Dawson testified that the measure would add little to the protection refugees already enjoyed under our laws (p. 4), that there would be no conflict with our immigration laws (p. 8), and that "there is nothing in this protocol which implies or puts any pressure on any contracting state to accept additional refugees as immigrants" (p. 10).

293 (Res. Br. 17–19) on the ground that Shen had Chinese nationality; accordingly, it is argued, Shen was a national in the "area" where his application could have been made and would, in any event, not have qualified for Section 203(a)(7) relief had he applied for relief in Hong Kong. The logic of this argument would, however, also disqualify respondent since as a resident of Hong Kong and as a national of China he was also a national in the "area" where his application could have been made. The truth of the matter is that respondent and Shen are in precisely the same position since neither applied for benefits outside the United States; thus neither was in the only situation in which the "not a national" provision can have any meaning.[8] The Second Circuit observed in *Shen* that to apply the "not a national" language to aliens applying in this country would be an "absurdity" since "the requirement would always be satisfied by an alien who had overstayed his temporary admission to the United States"; even if ap-

[8] It will be recalled that the instant application relies upon the proviso to Section 203(a)(7), which is designed to enable aliens temporarily in this country who are eligible for the refugee preference to acquire adjustment of status to permanent residence. They are entitled to an annual allotment of 5,100.

Opening this allotment to those who, like respondent, came to the United States as visitors from countries where they have stable homes would substantially reduce the opportunities available to those who are bona fide refugees and encourage evasion by those who gain entrance as visitors. As Senator Kennedy pointed out in Senate debate: "In any given year, one-half of these numbers may be used to adjust the status of previously paroled refugees who can qualify as permanent resident aliens." 111 Cong. Rec. 24227.

plicable, it would add nothing since "it would dictate merely that the alien could not be eligible if he was a national of the United States, the country in which his application was made" 428 F. 2d at 298, n. 6.

III

The district court found that respondent had not been firmly resettled in Hong Kong, and accordingly deemed it unnecessary to rule whether firm resettlement would have barred his application (App. 43–44; 295 F. Supp. 1370, 1372). On appeal, petitioner challenged the determination that respondent was eligible for relief under Section 203(a)(7); since the court of appeals held firm resettlement no bar, it did not review the district court's findings as to resettlement (App. 49; 419 F. 2d 252, 254). In our opening brief we proceeded on the assumption that the only issue before the Court was whether firm resettlement bars relief under Section 203(a)(7).

In quoting the district court's holding (Res. Br. 4), respondent may be requesting that this Court pass upon the propriety of that holding. If the district court's ruling becomes relevant to this Court's decision, we urge that respondent's seven-year residence in Hong Kong, his establishment of a stable home, family, and business, and the substantial rights and privileges accorded him, including the opportunity to visit foreign countries, sufficiently show that he was firmly resettled in Hong Kong. The result would have been different, of course, if respondent's stay in Hong Kong had been transitory, tenuous, or unstable. In

our view, respondent's intention to immigrate to the United States if the opportunity arose, shared with millions of other prospective immigrants, is not inconsistent with the stable residence in Hong Kong demonstrated by this record.

CONCLUSION

For the reasons stated herein and in our opening brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded with directions that the order of the Regional Commissioner be reinstated.

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JANUARY 1971.

APPENDIX

Relevant Provisions of Prior Laws

1. *Section 2(c), Displaced Persons Act of June 25, 1948, 62 Stat. 1009.*[1]

(c) "Eligible displaced person" means a displaced person as defined in subsection (b) above, (1) who on or after September 1, 1939, and on or before December 22, 1945, entered Germany, Austria, or Italy and who on January 1, 1948, was in Italy or the American sector, the British sector, or the French sector of either Berlin or Vienna or the American zone, the British zone, or the French zone of either Germany or Austria; or a person who, having resided in Germany or Austria, was a victim of persecution by the Nazi government and was detained in, or was obliged to flee from such persecution and was subsequently returned to, one of these countries as a result of enemy action, or of war circumstances, and on January 1, 1948, had not been firmly resettled therein, and (2) who is qualified under the immigration laws of the United States for admission into the United States for permanent residence, and (3) for whom assurances in accordance with the regulations of the Commission have been given that such person, if admitted into the United States, will be suitably employed without displacing some other person from employment and that such person, and the members of such person's family who shall accompany such person and who propose to live with such person, shall not become public charges and

[1] Similar provisions appear in the amendment of this statute on June 16, 1950, 64 Stat. 219.

will have safe and sanitary housing without displacing some other person from such housing. The spouse and unmarried dependent child or children under twenty-one years of age of such an eligible displaced person shall, if otherwise qualified for admission into the United States for permanent residence, also be deemed eligible displaced persons.

2. *Section 2, Refugee Relief Act of August 7, 1953, 67 Stat. 400, in pertinent part.*

SEC. 2. (a) "Refugee" means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural clamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.

(b) "Escapee" means any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the Union of Soviet Socialist Republics or other Communist, Communist-dominated or Communist-occupied area of Europe including those parts of Germany under military occupation by the Union of Soviet Socialist Republics, and who cannot return thereto because of fear of persecution on account of race, religion or political opinion.

(c) "German expellee" means any refugee of German ethnic origin residing in the area of the German Federal Republic, western sector of Berlin, or in Austria who was born in and was forcibly removed from or forced to flee from Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania, Union of Soviet Socialist Republics, Yugo-

slavia, or areas provisionally under the administration or control or domination of any such countries, except the Soviet zone of military occupation of Germany.

* * * * *

3. Section 15, Act of September 11, 1957, 71 Stat. 643, in pertinent part.

SEC. 15. (a) Notwithstanding the provisions of section 20 of the Refugee Relief Act of 1953, as amended (67 Stat. 400; 68 Stat. 1044), special nonquota immigrant visas authorized to be issued under section 3 of that Act which remained unissued on January 1, 1957, shall be allotted, and may be issued by consular officers as defined in the Immigration and Nationality Act, in the following manner:

(1) Not to exceed two thousand five hundred visas to aliens described in paragraph (1) of section 4(a) of the Refugee Relief Act, as amended;

(2) Not to exceed one thousand six hundred visas to aliens described in paragraphs (9) or (10) of such section 4(a);

(3) All the rest and remainder of said visas to aliens who are refugee-escapees as defined in subsection (c).

* * * * *

(c)(1) For purposes of subsection (a), the term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist, Communist-dominated, or Communist-occupied area, or (B) from any country within the general area of the Middle East, and who cannot return to such area, or to such country, on account of race, religion, or political opinion.

4. *Section 1, Fair Share Act of July 14, 1960, 74 Stat. 504.*

That under the terms of section 212(d)(5) of the Immigration and Nationality Act the Attorney General may parole into the United States, pursuant to such regulations as he may prescribe, an alien refugee-escapee defined in section 15(c)(1) of the Act of September 11, 1957 (71 Stat. 643) if such alien (1) applies for parole while physically present within the limits of any country which is not Communist, Communist-dominated, or Communist-occupied, (2) is not a national of the area in which the application is made, and (3) is within the mandate of the United Nations High Commissioner for Refugees.

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